

IN THE HIGH COURT OF JHARKHAND AT RANCHI
Cr. Appeal (D.B.) No. 485 of 2007
With
Cr. Appeal (D.B.) No. 654 of 2007

(Against the Judgement of conviction dated 29.03.2007 and Order of sentence dated 30.03.2007, passed by the 1st Additional Sessions Judge, Rajmahal, in S.C. No.142 of 2006.)

PRESENT

**HON'BLE MR. JUSTICE H.C. MISHRA
HON'BLE MR. JUSTICE B.B. MANGALMURTI**

For the Appellants : M/s. Jasvinder Mazumdar
Madhulika Gupta, Advocates
For the State : M/s. Shekhar Sinha, A.P.P.

C.A.V. on 01.08.2018

Pronounced on 31.08.2018

H.C. Mishra, J.:- As both these appeals arise out of the same impugned Judgement, they were heard together and are being disposed of by this common Judgement.

2. Heard learned counsel for the appellants and the learned counsel for the State.

3. The appellants are aggrieved by the impugned Judgement of conviction dated 29.03.2007 and Order of sentence dated 30.03.2007, passed by the learned 1st Additional Sessions Judge, Rajmahal, in S.C. No.142 of 2006, whereby, all these appellants have been found guilty and convicted for the offences under Sections 302 / 149 of the Indian Penal Code and Section 27 of the Arms Act, read with Section 34 of the Indian Penal Code. Upon hearing on the point of sentence, the appellants have

been sentenced to undergo R.I. for life and fine of Rs.25,000/- each for the offence under Sections 302 / 149 of the Indian Penal Code, and R.I. for three years each for the offence under Section 27 of the Arms Act, and both the sentences were directed to run concurrently.

4. The prosecution case was instituted on the *fardbeyan* of the informant Sugiya Devi, the wife of the deceased Kartik Pandit, recorded at Babhangama road on 12.10.2005 at about 18:10 hours, stating therein that on the same day at about 4:30 P.M., there was a quarrel between Babulal Turi and Moti Lal Sah in her village Sakarbanga, P.S. Taljhari, District- Sahebganj, whereupon her husband intervened in the quarrel and after pacifying Babulal Turi he sent him inside his house. Thereafter, he came to his own house and sat outside his house. In the meantime her co-villagers Sohan Lal Sah, Krishna Pandit, Vishnu Pandit and Thakur Sah came there and started dragging her husband. All of them threw him down in front of the house of Manoj Sah. Manoj Sah came out of his house with a *garansa* in his hand and he assaulted her husband on his right hand amputating his hand from wrist. Moti Lal Sah assaulted her husband by *daab* and in the meantime the mother of Moti Lal Sah came with a *bhala* and she was also accompanied with Sonia Kumari, the daughter of the accused Moti Lal Sah, and both of them started assaulting her husband by *bhala*. The informant was crying for help but no one was coming to the rescue of her husband. In the meantime, Chotka Hansda took the *bhala* from the hand of the mother of Moti Lal and pierced it in the chest of her husband. By that time some persons started assembling there, when Thakur Sah assaulted her husband by fire arm on the left side of his chest. Chunnu Rajwar and Kamal Pandit were also amongst the persons who were assaulting her husband. Thereafter they fled away. She has further stated that her villager Bishu Pandit was taking her husband to hospital, but her husband died in the way. Thereafter they were going to Police Station on a hired jeep, when they met the police on the road, where her *fardbeyan* was recorded. She has stated that the occurrence had taken place due to the dispute of village road. On the basis of the *fardbeyan* of the informant, Taljhari P.S. case No. 40 of 2005, corresponding to G.R. No. 384 of 2005 was instituted for the offences

under Sections 302 / 34 of the Indian Penal Code, and Section 27 of the Arms Act, against the ten named accused persons and investigation was taken up. After investigation the police submitted the charge-sheet against seven accused persons, including these appellants, and one Thakur Sah, whose case was separated as he was found to be a juvenile.

5. After commitment of the case to the Court of Session, charge was framed against all these six accused persons for the offences under Sections 302 / 149 of the Indian Penal Code, and Section 27 of the Arms Act, and upon the accuseds' pleading not guilty and claiming to be tried, they were put to trial.

6. In course of trial 17 witnesses were examined by the prosecution, including the Investigating Officer and the Doctor, who had conducted the *post-mortem* examination on the dead body of the deceased. It may be stated that out of the material witnesses examined, eight witnesses, including the informant of the case, have turned hostile and have not supported the prosecution case, and they are P.W.-3 Bishu Pandit, P.W.-4 Lal Mohan Pandit, P.W.-6 Ram Chandra Pandit, P.W.-7 Chandan Das, who is only a seizure list witness and has identified his signature on the seizure list, and P.W.-16 Sugiya Devi, the wife of the deceased and the informant of the case. Three more witnesses who have turned hostile, are P.W.-12 Net Lal Thakur, P.W.-13 Phoni Thakur and P.W.-14 Munshi Kisku, and they have stated that the occurrence had taken place as the prosecution side was abducting the daughter of Moti Lal Sah, and the deceased was killed in a bid to save her. We have also looked into the case diary and we find that these witnesses had not stated anything like that in their statements recorded under Section 161 of the Cr.P.C., rather they had given their statements before the police as eyewitnesses to the occurrence, fully supporting the prosecution case. It may be stated that the defence has also proved the certified copies of the depositions of the witnesses recorded in the case of Thakur Sah, which were marked Exhibit-A series, but the same were not taken into consideration by the Trial Court below, and in our view rightly so, as the attention of none of these witnesses were drawn towards those depositions. The defence has also proved one complaint petition of P.C.R. No. 358 of 2005, but the

same is not available on the L.C.R., and this appears to be the complaint case filed by the wife of the accused Moti Lal Sah, alleging abduction of her daughter, which appears to be filed later, as a counter-case.

7. P.W.-1 Basudeo Pandit is the father of the deceased, and he has supported the case as eye witness to the occurrence. He has stated that Kartik Pandit was his son, who was murdered on the previous Vijay Dashmi day. His son had taken meal in his house and was ready to visit the *mela*. At about 4:00 P.M., he was sitting at the door of his house, where Krishna Pandit, Vishnu Pandit, Chunnu Rajwar, Sona, etc., came and dragged his son towards the house of Moti Saw, where they threw him down. Kamal Pandit, Fouche (alias name of Chotka Hansda) and Manoj assaulted his son by *garansa* cutting his right hand at two places. They also assaulted his son by *barchhi* on his head and mother of Moti assaulted him by *forne*. Sonia, the daughter of Moti, also assaulted his son on his shoulder by *Kainda*, which he has explained to be a sharp cutting weapon. This witness has stated that seeing the occurrence, he fainted. He has also stated that Mutku Saw assaulted his son by fire arm. Mutku Saw is the *bhagina* (sister's son) of Moti Lal. He has identified the accused persons in the Court. This witness was put to extensive cross-examination, wherein he has given the topography of the place of occurrence, from which it appears that the houses of the accused persons and the informant's side are situated nearby, and the house of Moti Saw is at a distance of about 75 to 100 feet from the house of this witness. He had denied the suggestion that his son was a veteran criminal, but he has admitted that his son was sentenced in a rape case. He has denied the suggestion to have given false evidence.

8. P.W. 9 Anita Devi has stated that at the time of occurrence she was playing her child on the road, when she saw Sono Sah, Vishnu Pandit, Kishan, Chunnu Rajwar and Chotka @ Fouche were dragging the deceased Kartik and they had threw him down. Manoj Sah assaulted him by *garansa* cutting his hand, Moti Lal Sah also assaulted him by *daab*, the mother of Moti Lal Sah came with a *bhala* and she also assaulted the deceased by *bhala* and thereafter Fouche Santhal took the *bhala* from her and assaulted the deceased by *bhala*. Thakur Sah assaulted him by

firearm. Thereafter, this witness entered her house. She has identified the accused persons in the Court. In her cross-examination she has stated that Sagori Devi has also filed a case in which her husband is also an accused. She has denied the suggestion of giving the false evidence.

9. P.W.-10 Bhuwneshwari Devi has also stated at the time of occurrence she was going to the shop, when she saw Sono Sah, Krishna Pandit, Vishnu Pandit were dragging the deceased Kartik. Moti Lal Sah, Chotka Santhal, Chunnu Rajwar and Thakur Sah threw him down. Manoj Sah assaulted Kartik by *garansa* cutting his right hand. The mother of Moti Lal came out with a *bhala* and Focho Santhal also assaulted the deceased with the same *bhala*. Moti Lal, Sonia and Sono were also having *daab*. Thakur Sah assaulted Kartik by fire arm. She has also stated that upon seeing the occurrence she fainted.

10. P.W.-11 Manoj Pandit is the son of Bhuwneshwari Devi. He has also supported the prosecution case as eye witness in more or less the same manner as stated by other eye witnesses, and has also stated that his mother fainted on seeing the occurrence. He is also the witness to the inquest report and has proved his signature thereon. In his cross-examination this witness has stated that he had been to jail, but he does not remember in which case he was in jail. He has denied the knowledge that it was a dacoity case. He has also admitted that he is also an accused in the case filed by Sagori Devi, and he has denied the suggestion that they were abducting Sonia Kumari, and the deceased was killed in an attempt to save her.

11. P.W.-15 Babu Lal Turi has also supported the case stating that upon hearing the noise that Kartik was assaulted, he came out of the house and saw all the accused persons armed with *daab*, *gainta*, *bhala* etc., and they had apprehended the accused who had fallen down after being assaulted. Thereafter, these accused persons started fleeing away and Thakur Sah assaulted the deceased by fire arm. This witness is also witness to the inquest report and has proved his signature thereon. This witness has also identified the accused in the Court. He has also admitted that he is an accused in the case filed by Sagori Devi. He has denied the suggestion of giving false evidence.

12. P.W.-5 Hemu Pandit and P.W.-8 Gopal Pandit have supported the case as hearsay witnesses. P.W.-5 has stated that he had seen the deceased being taken to hospital and his hand was amputated, but he was able to speak. The deceased informed him that Manoj Sah had amputated his hand and Mutku Sah had assaulted him by firearm. He also saw the amputated hand near the house of Moti Lal and then Subal's wife informed him about rest of the occurrence. In his cross-examination this witness has stated that Kartik was his nephew, and his son and the deceased were accused in a dacoity case. He has denied the fact that Sagori Devi had filed a case upon the deceased of abducting her daughter. He has admitted that he had not given the statement before the police that when he saw the deceased he was alive and he was able to speak, but he had given the statement before the police that he was informed by the deceased that Manoj had amputated his hand and Mutku had assaulted him by fire arm and that he had seen the amputated part of the hand on the road near the house of the accused Moti Lal Sah. He has denied the suggestion that the deceased was abducting the daughter of Moti Lal, due to which the occurrence had taken place in which he was killed. Similarly P.W.-8 Gopal Pandit has stated that upon hearing the noise he came out of the house and saw the deceased in injured condition. His hand was amputated and he had also received fire arm injury. He has also stated that Kartik informed him giving the details of the occurrence. In his cross-examination he has denied the suggestion to have given the statement before the police that he was informed about the occurrence by Bishu Pandit. He has stated that Basudeo Pandit had fainted on seeing the occurrence. He has also admitted that he is also an accused in the case of kidnapping of the daughter of Moti Lal Sah and has stated that it was a false case. He has denied the suggestion that the deceased had died in a bid to save that girl.

13. P.W.-2 Dr. Dhirendra Kumar had conducted the *post-mortem* examination on the dead body of the deceased on 13.10.2005, and had found the following *ante-mortem* injuries:-

- i) *Right hand amputated from wrist joint.*
- ii) *Incised wound on neck measuring 6" x 1/6" x Skin deep in front.*

- iii) Incised wound on neck back side 3" x 1/6" x Skin deep.*
- iv) Incised wound on right elbow joint 2" x 1/6" x bone deep.*
- v) Lacerated wound on Chest 2" x 1/4" x muscle deep.*
- vi) Incised wound on back right side measuring 8" x 1" x muscle deep.*
- vii) Incised wound on right cheek measuring 3&1/2" x 1/3" x Skin deep.*
- viii) Round 1/2" diameter entry piercing wound with mark blackening surrounding the wound on lateral side of left chest.*
On dissection of body, single bullet was found in pelvic region, which pierced pleura, lungs, diaphragm stomach and small intestine,
Injury No.i, ii, iii, iv, vi and vii were caused by sharp cutting instrument, injury No. v by hard and blunt substance, and injury No. viii by fire arm weapon.

Rigor mortis was present. Skull N.A.D.

Brain- Pale, Heart-Left chamber empty, right chamber few blood and clot.

Stomach and its contents:- Undigested food materials present. Large and small intestine contained fecal matter. Liver, Spleen and Kidney- Pale, Urinary Bladder- residuary urine.

This witness has stated that the cause of death was cardio-respiratory failure due to shock and haemorrhage due to fire arm injury and sharp cutting injuries. He has identified the *post-mortem* report to be in his pen and signature which was marked Exhibit-1. He has also stated that the *post-mortem* of the deceased was conducted along with one another Doctor, namely, Dr. Alimuddin, and he has identified the signature of that Doctor also on the *post-mortem* report, which was marked Exhibit 1/A.

14. P.W.-17 is Ajay Kumar, the I.O. of the case. This witness has stated that on 12.10.2005 he was posted as officer in-charge in Taljhari Police Station. He recorded the *fardbeyan* of Sugiya Devi at Babhangama turning. He has proved the *fardbeyan*, which was marked Exhibit-4. He had also prepared the inquest report of the dead body which also he has proved and the same was marked Exhibit 2/A. He sent the dead body for *post-mortem* examination and he proceeded towards Sakarbhanga village, where the occurrence had taken place. He seized the blood stained soil and blood stained *bhala* from the road, in front of the house of Manoj Sah. He has proved the seizure list which was marked Exhibit-5.

He had also seen the amputated part of the hand at the place of occurrence, about which he mentioned in the inquest report also. He has given the boundaries of the place of occurrence in which in one boundary there is the house of the accused Moti Lal Sah and in the other boundary there is house of the deceased Kartik Pandit. He received the *post-mortem* report and submitted the charge-sheet against the accused persons. In his cross-examination this witness has stated that the F.I.R. was lodged against ten persons, but he had submitted the charge-sheet against seven accused persons and had not found any evidence against three accused persons. He had received the information by way of rumor about the occurrence on 12.10.2005 at about 5:00 P.M., and he had made the *sanha* entry about that information. It took about 45 minutes time to reach Babhangama, where he saw the dead body on a jeep. He had seen the firearm injury also on the dead body. He had not seized the clothes of the deceased. He has also stated that the pellet was recovered from the dead body which was handed over to him, but he had not sent it for forensic examination. His attention was drawn towards the statements of some witnesses, which he has replied, but they do not appear to be very important, as they do not relate to the manner of assault, except the evidence of P.W.-9 Anita Devi, about which this witness has admitted that she had not stated before him that Manoj Sah had amputated the hand by *garansa* and Moti Lal Saw had assaulted the deceased by *daab*. He has given the criminal antecedents of the deceased, which show that the deceased was an accused in dacoity cases and also in a rape case. This witness has also produced the blood stained *bhala* and the blood stained soil in the Court, which were marked material Exhibit-I and material Exhibit-II respectively.

15. The statements of the accused persons were recorded under section 313 of the Cr.P.C., wherein they have denied the evidence against them. No witness was examined by the defence, but the defence has proved the documents as detailed above. On the basis of the evidence on record the accused persons have been convicted and sentenced as aforesaid.

16. Learned counsel for the appellant has submitted that the impugned Judgement of conviction and Order of sentence passed by the Trial Court

cannot be sustained in the eyes of law, in as much as, the prosecution has failed to bring home the charges against the accused persons beyond all reasonable doubts, as the evidences of the witnesses are full of contradictions. Even the informant of the case, who is none else than the wife of the deceased, has turned hostile and has not supported the prosecution case at all. P.W.-9 Anita Devi, who has claimed to be an eye witness to the occurrence, is not the eye witness to the occurrence, as is apparent from the evidence of the I.O., as her statements given before the Court is contradicted by the I.O. Even about the manner of occurrence there are discrepancies in the evidence of the witnesses, as to which accused had assaulted the deceased by what weapon. Learned counsel submitted that though there is allegation of assaulting the deceased by *bhala* also, but no piercing injury was found on the deceased, as is apparent from the evidence of P.W.-2 Dr. Dhirendra Kumar. Learned counsel has placed reliance upon the decision of the Hon'ble Supreme Court of India in **Chetu & Anr. Vs. State of Madhya Pradesh**, reported in (2008) 17 SCC 273, submitting that in the said case also the informant had turned hostile and had not supported the prosecution case, and the impugned judgement of conviction was set aside by the Hon'ble Apex Court. Learned counsel has accordingly, submitted that in the facts of this case the appellants were entitled at least to the benefits of doubt.

17. Learned counsel for the State on the other hand has opposed the prayer, submitting that case is fully supported by P.W.-1 Basudeo Pandit, the father of the deceased, P.W.-9 Anita Devi, P.W.-10 Bhawneshwari Devi and P.W.-11 Manoj Pandit, as eye witnesses to the occurrence. P.W.-15 Babu Lal Turi is the eye witness to the part of the occurrence, he had seen all the accused persons armed with weapons and he had reached the place of occurrence after the assaults made by sharp cutting weapons, but is an eye witness to the assault made by firearm. P.W.-5 Hemu Pandit and P.W.-8 Gopal Pandit have also supported the case as hearsay witnesses, and the ocular evidence of these witnesses is fully corroborated by the evidence of P.W.-2 Dr. Dhirendra Kumar, and the *post-mortem* report proved by him as Exhibit-1. It is submitted by learned counsel that several sharp cut injuries were found on the dead

body of the deceased and even the hand of the deceased was found to be amputated. The injuries on the deceased were sufficient in the ordinary course of nature to cause the death. It is submitted by learned counsel that even though the informant has not supported the prosecution case, but the prosecution case is supported by other eye witnesses and the prosecution has been able to bring home the charges against the accused persons beyond all reasonable doubts and there is no illegality in the impugned Judgement of conviction and Order of sentence.

18. Having heard learned counsels for both sides and upon going through the record, we find that the prosecution case is fully supported by P.W.-1 Basudeo Pandit, the father of the deceased, P.W.-9 Anita Devi, P.W.-10 Bhuvneshwari Devi and P.W.-11 Manoj Pandit, stating that these accused persons, who were variously armed and were forming an unlawful assembly, had dragged the deceased from his house to the place of occurrence, where he was assaulted by the accused persons, his hand was amputated and he was also assaulted on the other parts of the body by the accused persons by sharp cutting weapons, which clearly show that the occurrence was committed in the prosecution of the common object of the unlawful assembly, of which these appellants were members. All of these accused appellants had taken active part either in dragging the deceased to the place of occurrence, and / or assaulting the deceased. The submission of learned counsel for the appellants that the evidence of the I.O. P.W.-17 Ajay Kumar, shows that P.W.-9 Anita Devi is not an eye witness to the occurrence, cannot be accepted, in view of the fact that we have also looked into the case diary and have found that she had given her statement before the police as an eye witness to the occurrence, may not be in the same manner about which the contradiction has been taken from the I.O. The fact remains that she is also an eye witness to the occurrence. Minor discrepancies here and there in the evidence of the witnesses is natural in such cases, and the entire prosecution case cannot be thrown away only due to some minor discrepancies in the evidences of the witnesses supporting the prosecution case. We also find that P.W.-15 Babu Lal Turi is an eye witness to the part of the occurrence, as he had not seen the accused appellants assaulting the deceased, as by the time he

reached the place of occurrence, the deceased had already been assaulted and injured. He saw the amputated part of the hand and the other injuries on the deceased, and he had seen the accused persons armed with deadly weapons who were fleeing away, and at the time of fleeing the co-accused Thakur Sah had assaulted the deceased by fire arm. P.W.-5 Hemu Pandit and P.W.-8 Gopal Pandit have also supported the prosecution case as hearsay witnesses. The ocular evidence of these witnesses is fully supported by the medical evidence of P.W.-2 Dr. Dhirendra Kumar and the *post-mortem* report proved by him as Exhibit-1, which shows that the right hand of the deceased was amputated from the wrist joint. There were several incised wounds and lacerated wound on the dead body, including on the vital part, namely, neck and chest, and the bullet was also found lodged in the pelvic region, piercing the internal vital organs. Though piercing wound is not there, but it cannot be said that any of these wounds could not be caused by *bhala* also.

19. As regards the defence taken in the cross-examination of some of the witnesses, that the daughter of the accused Moti Lal Sah was being abducted and the deceased was killed in a bid to save her, this appears to be only an afterthought, in as much as, no police case was lodged for the said alleged occurrence, and only a complaint case was filed later. Even though some of the hostile witnesses, namely, P.W.-12 Net Lal Thakur, P.W.-13 Phoni Thakur and P.W.-14 Munshi Kisku have stated that the deceased was abducting the daughter of the accused Moti Lal Sah, due to which the occurrence had taken place, but as stated earlier, there is nothing like that in their statements recorded under Section 161 of the Cr.P.C., which fact we have verified from the case diary, and even these witnesses had supported the case as eye witnesses to the occurrence in their statements before the police. As such, this defence cannot be taken into consideration.

20. Though it is a fact that the I.O. has proved the criminal antecedents of the deceased, but that alone cannot be a good ground for committing the murder of the deceased. The submission of the learned counsel for the appellant that the informant of the case, who is none else than the wife of the deceased had turned hostile and as such the prosecution has failed to

bring home the charge against the accused beyond all reasonable doubts, is of no help to the learned counsel for the defence, as the prosecution case is supported by four eye witnesses, including the father of the deceased. The case law relied upon by learned counsel in **Chetu's** case (*supra*), is of no help to the learned counsel, as in the said case all the material witnesses, including the informant had turned hostile. None of the material witnesses had supported the prosecution case, still the Trial Court had recorded the Judgement of conviction, which was ultimately set aside by the Hon'ble Apex Court.

21. We are of the considered view that in the present case the prosecution has been able to bring home the charge under Sections 302 / 149 of the Indian Penal Code against all the accused appellants beyond all reasonable doubts, and there is no illegality in the impugned Judgement of conviction and Order of sentence passed by the Trial Court below on this score. However, we find that there is no allegation against any of these appellants to have assaulted the deceased by firearm. This allegation is only against the other co-accused, and the evidence is that while fleeing away the said co-accused assaulted the deceased by fire arm. There is nothing on the record to show that this assault by fire arm was made in prosecution of common object of the unlawful assembly of which these appellants were members, or in furtherance of the common intention of all the accused persons. As such the conviction of the appellants under Section 27 of the Arms Act, cannot be sustained in the eyes of law.

22. For the foregoing reasons, the impugned Judgement of conviction dated 29.03.2007 and Order of sentence dated 30.03.2007, passed by the learned 1st Additional Sessions Judge, Rajmahal, in S.C. No.142 of 2006, so far as they relate to the conviction and sentence of the appellants under Section 27 of the Arms Act, are hereby, set aside. The aforesaid Judgement of conviction and Order of sentence convicting and sentencing the appellants for the offence under Sections 302 / 149 of the Indian Penal Code, are hereby, affirmed. The appellants Manoj Kumar Sahu @ Manoj Saha and Motilal Saha @ Motilal Sah are already in custody, undergoing the sentence.

23. The other appellants, Chotka Hansda @ Chotu Hansda, Chunnu Rajwar, Krishna Pandit and Vishnu Pandit are on bail. Their bails are hereby, cancelled and they are directed to surrender in the Court below forthwith for undergoing the sentence passed by the Trial Court. The Trial Court below is also directed to issue the process forthwith compelling the surrender / production of these appellants for undergoing the sentence.

24. Both these appeals are accordingly, dismissed with the modification in the conviction and sentence as aforesaid. Let the Lower Court Records be sent back to the Court concerned forthwith, along with the copy of this Judgement.

(H.C. Mishra, J.)

B.B. Mangalmurti, J.:-

(B.B. Mangalmurti, J.)

Jharkhand High Court, Ranchi.
Dated the 31st of August, 2018.
D.S./ N.A.F.R.